Exhibit A

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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. AMMON BUNDY, et al., Defendants.	3:16-CR-00051-BR (Proposed) Amicus Curiae Brief

I. Introduction

Proposed amicus, Center for Biological Diversity, agrees with the United States of America that "the Property Clause [of the U.S. Constitution] vests plenary authority over federal lands—such as the Malheur National Wildlife Refuge—in Congress, including the power of permanent ownership." U.S. Government's Response to Defendants' Motion to Dismiss for

Lack of Subject Matter Jurisdiction, at 2 (ECF No. 570). If this Court reaches the issue, the purpose of this brief is to provide legal history and further elucidate that Article IV, Section 3 of the Constitution has possessed a consistent interpretation since the beginning days of the Republic.

II. History and Binding Legal Precedent Regarding Article IV, Section 3 of the U.S. Constitution (The "Property Clause")

The Property Clause states that:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

U.S. Const. art. IV, § 3, cl. 2.

a. Early Supreme Court Cases Recognize the Property Clause Provides the Federal Government Power to Acquire and Indefinitely Hold Property

Recognizing the power of Congress to pass laws regarding federal property interests covered by Article IV, Section 3, Chief Justice Marshall stated that the "power of governing and of legislating for a territory is the inevitable consequence of the right to acquire and to hold territory. Could this position be contested, the Constitution of the United States declares that 'Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.'" *Sere & Laralde v. Pitot*, 10 U.S. 332, 336-337 (1810).

In a case upholding a federal land patent over a competing state grant, Justice Field noted that "'Congress has the sole power to declare the dignity and effect of titles emanating from the United States; and the whole legislation of the Federal government, in reference to the public

lands, declares the patent the superior and conclusive evidence of legal title.'"[1] *Gibson v. Chouteau*, 80 U.S. 92, 102-103 (1871) (quoting *Bagnell v. Broderick*, 38 U.S. 436, 450 (1839)).

Justice Field also wrote the opinion in the unanimously decided *Ft. Leavenworth R. Co. v. Lowe*, 114 U.S. 525 (1885), which upheld a state tax upon a railroad company on a federal military reservation pursuant to an agreement between Kansas and the federal government. The Court explained that:

> since the adoption of the Constitution, they [the United States] have by cession from foreign countries, come into ownership of a territory still larger, lying between the Mississippi River and the Pacific Ocean, and out of these territories several States have been formed and admitted to the Union. *The proprietorship of the United States in large tracts of land within these States has remained after their admission.*
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> *Id*. at 532 (emphasis added).[2]

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[1] Congress also possesses the power, as it exercised with Oregon and other states, to negotiate different terms of state admittance into the United States, particularly as it relates to retained and new federal property ownership: "The requirement of equal footing does not demand that courts wipe out diversities 'in the economic aspects of the several States,' but calls for 'parity as respects political standing and sovereignty.' The power of Congress to cede property to one state without corresponding cession to all states has been consistently recognized." *Alabama v. Texas*, 347 U.S. 272, 275 (1954) (citations omitted) (J. Reed Concurring).

[2] Further, in reference to Defendants' enclave clause arguments pursuant to Article I, Section 8, Clause 17 of the Constitution ("Enclave Clause"), as well as their position on permanent federal government ownership of property, Justice Field's quotation continues: "There has been therefore, no necessity for them to purchase or to condemn lands within those States, for forts, arsenals, and other public buildings, unless they had been disposed of what they afterwards needed. Having the title, they have usually ***reserved*** *certain portions of their lands* ***from sale*** *or other disposition*, for the uses of the government." *Ft. Leavenworth R. Co.*, 114 U.S. at 532 (emphasis added); *see also Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518, 529-30 (1938) ("The United States has large bodies of public lands. These properties are used for forests, parks, ranges, wild life sanctuaries, flood control and other purposes not covered by [Constitution Article I, Section 8] Clause 17.").

b. Pursuant to the Property Clause, Congress Has Power to Protect, Manage, Control and Hold Public Lands

One of the very first Article IV cases in the United States involved a plaintiff who did not want to pay for leases issued to him by the federal government for a mine on federal public lands. In response to plaintiff's argument that Article IV, Section 3 only dealt with the power by Congress to "dispose" of federal lands, the Supreme Court cited the "needful rules and regulations" clause of Article IV, Section 3 and upheld the lease payments. *United States v. Gratiot*, 39 U.S. 526 (1840).

Since the early 19th century, the U.S. Supreme Court has had numerous opportunities to revisit and analyze Article IV, Section 3, Clause 2 of the Constitution. Every single time, the Court has reaffirmed the plain— and wide —reading of the Congressional power to retain, use, sell, buy, manage, and conserve public lands. "It is firmly settled that Congress may prescribe rules respecting the use of the public lands. It may sanction some uses and prohibit others, and may forbid interference with such as are sanctioned." *McKelvey v. United States*, 260 U.S. 353, 359 (1922). "Under the Constitution (Art. IV, § 3) Congress has plenary power to dispose of and to make all needful rules and regulations respecting the naval oil reserves, other public lands and property of the United States." *Sinclair v. United States*, 279 U.S. 263, 294 (1929). "And the power of the United States to thus protect its lands and property does not admit of doubt." *Hunt v. United States*, 278 U.S. 96, 100 (1928). "Also beyond challenge is the power of the Federal Government to impose reasonable conditions on the use of federal lands, federal property and federal privileges." *Ivanhoe v. McCracken*, 357 U.S. 275, 295 (1958).

III. The Enduring Strength of Article IV, Section 3

While the Supreme Court has made it clear that the plain language of Article IV, Section 3 is inviolate, it has also explained that the people's branch—Congress—has wide authority to

make rules, change rules, and even delegate the power to make rules regarding federal public lands. Notably, in *Camfield v. United States*, 167 U.S. 518, 525-528 (1897), it was held that Congress possessed the constitutional right to protect public lands from activities by adjoining private landowners, for example if such action constitutes a nuisance. In fact, the only time the Supreme Court questions the reach of Article IV, Section 3 is when it asks how far the Congressional power to regulate *private property* goes under the Property Clause. *See, e.g., Kleppe v. New Mexico*, 426 U.S. 529, 546-47 (1976); *see also United States v. Alford*, 274 U.S. 264, 267 (1927) ("Congress may prohibit the doing of acts upon privately owned lands that imperil the publicly owned forests.").

In *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915), the Supreme Court held that Congress had implicitly delegated power to the President to withdraw federal public lands from oil exploration.[3] "The power of the Executive, as agent in charge, to retain the property from sale need not necessarily be expressed in writing . . . . For it must be borne in mind that Congress not only has a legislative power over the public domain, but it also exercises the powers of the proprietor therein." *Id.* at 474.

Congress also frequently exercises its power over public lands, including for example the passage of the National Forest Management Act, 16 U.S.C. §§ 1600 -1614, and the Federal Land Policy and Management Act, 43 U.S.C. §§ 1701-1785, in the mid-1970s. Congress also responded to the courts when appropriate about exercising its Article IV duties and authorities. For example, after *United States v. California*, 332 U.S. 19 (1947), which held that Congress had a long-standing policy of recognizing federal ownership of the three-mile belt from shore to sea,

[3] A delegated Presidential action was also at issue in *United States v. Oregon*, 295 U.S. 701 (1935) (81,786 acres within Oregon, including portions of Lake Malheur, ordered, adjudged and decreed to the United States after a quiet title action by the latter).

Congress later gave this three mile stretch back to the states by statute. *See* Outer Continental Shelf Lands Act of 1953, 43 U.S.C. 1331 - 1356, P.L. 212, Ch. 345, August 7, 1953, 67 Stat. 462.

The Property Clause is not only a cornerstone of the Constitution, but it is also a provision profoundly responsive to the people. As the Supreme Court has reminded: "[W]e cannot and do not assume that Congress, which has constitutional control over Government property, will execute its powers in such way as to bring about injustices to states, their subdivisions, or persons acting pursuant to their permission." *U.S. v. California*, 332 U.S. at 40.

IV. Conclusion

Defendants' arguments, seeking to circumvent the federal government's power over federal public lands, fly in the face of over two centuries of Constitutional interpretation, practice and precedent. Not one case or legal provision supports Defendants' reading of the Constitution and laws of the United States, at issue with the current Motion to Dismiss.

Respectfully submitted,

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